

**SOAH DOCKET NO. 582-10-2631  
TCEQ DOCKET NO. 2009-1573-DIS**

<b>PETITION OF LAVON 593 LAND</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>INVESTMENT PARTNERS, L.P. FOR</b>	<b>§</b>	
<b>CREATION OF COLLIN COUNTY</b>	<b>§</b>	<b>OF</b>
<b>WATER CONTROL AND</b>	<b>§</b>	
<b>IMPROVEMENT DISTRICT NO. 3</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**CITY OF WYLIE’S EXCEPTIONS TO PROPOSAL FOR DECISION**

**TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:**

COMES NOW, Applicant, the City of Wylie (“Wylie” or “City”) and presents this its *Exceptions to the Proposal for Decision* in the above-referenced proceeding. The City respectfully disagrees with the Administrative Law Judge’s recommendation to grant the application for creation of the district and prays that the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) deny the application. The City appreciates the opportunity to present these suggested modifications.

**I. THE CITY’S RECOMMENDED MODIFICATION TO FINDINGS OF FACT**

Based on the arguments and evidence produced at the Hearing on the Merits, the City suggests the following revisions to the Administrative Law Judge’s Findings of Fact as provided below:

1. *The City suggests a change to Finding of Fact No. 18 to read as follows: “The total cost of the capital improvements to be provided by the District is unknown. The record evidence does not indicate true costs of the project.”*

Lavon 593 Land Investment Partners, L.P. (“Lavon” or “Applicant”) calculated a proposed tax rate of \$1.00 per \$100 of valuation in property for the District.<sup>1</sup> Mr. Thompson broke that down by estimating that \$0.92 was attributable to debt service for the plant and \$0.08

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<sup>1</sup> See Exhibit A-11, page 29 of 36.

was attributable to maintenance and operations.<sup>2</sup> But as one of Lavon's other experts, Mr. Hill, conceded, Mr. Thompson did not take into account the total cost of a 0.9 MGD plant by costing out a 0.746 MGD plant.<sup>3</sup> In other words, the only record evidence adduced by Lavon actual costs of the project are by indicating costs much lower than what is proposed for a 0.9 MGD plant. Without question, the estimated tax rate must go up to account for this error, but by how much is anyone's guess since Lavon did not bother to provide this information. The Commission is left to speculate what the actual tax rate might be.

2. *The City suggests changes to Finding of Fact Nos. 29 and 30 to read as follows:*  
"29. *Wylie's Creekside Estates sewer line was designed to serve the area shown on Wylie's capital improvement plan, which does not include the area proposed to be included in the District. However, such line may accommodate a majority of the flow from the District.*

*"30. The evidence establishes that there is sufficient capacity available in the Creekside Estates sewer line to serve the area of the District within Wylie's ETJ."*

With only one-third of the proposed District in Wylie's ETJ,<sup>4</sup> Wylie clearly has enough capacity in its Creekside sewer line to serve future inhabitants in the proposed District portion of its ETJ. The Legislature created municipal ETJs to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities.<sup>5</sup> That Wylie may have a general policy now not to provide sewer service<sup>6</sup> to homes that it does not also serve with water in no way inhibits Wylie from altering that policy if there is sufficient demand for service in the future where absolutely none currently exists. However, there is no need for Wylie alter any policy as Lavon has not applied for any service to any portion of its proposed development.

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<sup>2</sup> Thompson prefiled testimony, pages 11-12.

<sup>3</sup> See Hill testimony, RR 98:23- 99:11.

<sup>4</sup> See Thompson testimony, RR 57:20- 58:6.

<sup>5</sup> TEX. LOC. GOV'T CODE §42.001.

<sup>6</sup> Again, there is little point in belaboring whether Wylie's sewer service policy speaks only to retail or also includes wholesale service as only the City Council can authoritatively speak on matters of municipal policy.

3. *The City suggests a change to Finding of Fact No. 32 to read as follows: “32. Applicant has not applied for service, either retail or wholesale, from Wylie.”*

The record is devoid of any application for service from the Applicant to the City. While a petition for service was provided, such is distinguished in the law from an application for service. The City is not required to act on a request for service.

4. *The City suggests changes to Finding of Fact Nos. 36, 37, and add a new Finding of Fact No. 38 and to re-number the remainder accordingly to read as follows: “36. Applicant has not demonstrated any benefit to the land within the District and the residents and further the public welfare by providing comprehensive water, sewer, and drainage facilities and services.*

*“37. The District will not further the public welfare.*

*“38. There is no public necessity for the District.”*

The Texas Supreme Court has defined “public necessity” as “being ‘a substantial or obvious community need for the proposed [district] in light of the attendant circumstances, as distinguished from a mere convenience on the one hand and an absolute or indispensable need on the other.’”<sup>7</sup> Lavon failed to adduce sufficient evidence of public necessity.

The question that must be answered in the affirmative if the phrase “public necessity” is given its full meaning, is whether Lavon established by a preponderance of the evidence that there exists for **all** of the land in the proposed district an **obvious** need for the creation of the proposed District.<sup>8</sup> If, on the other hand, the District simply allows a private land developer the mechanism to increase its profitability and to give it a competitive advantage over other private land developers,<sup>9</sup> Wylie contends such evidence ignores the **public** portion of the “public necessity” equation.<sup>10</sup>

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<sup>7</sup> *State Banking Bd. v. First State Bank of Gainesville*, 618 S.W.2d 905, 908 (Tex.Civ.App.-Austin 1981, no writ), citing *Gerst v. Nixon*, 411 S.W.2d 350, 358 (Tex. 1966).

<sup>8</sup> See TEX. WATER CODE §51.021(a)(3); *State Banking Bd.*, 618 S.W.2d at 908 (emphasis added).

<sup>9</sup> LeBlanc testimony, RR 43:23- 44:3.

<sup>10</sup> See *id.*

All Lavon offered on “public necessity,” aside from the boilerplate language contained in its prefiled testimony, is a belief that communities with more amenities such as parks and walking trails are superior to those without them, and that lower lot costs might theoretically benefit the consumer while making the development more profitable for Hanover. The true “necessity” of the proposed District is even more starkly put into focus when the court considers the impact of denying district creation. Lavon grudgingly conceded that a denial did not mean that it could not develop the land and put even more lots into an already over-saturated market. Instead, denial just means that it could not put **as many** lots on the ground – it would simply have to create a development with one-acre lots on septic tanks.<sup>11</sup> Thus, while Lavon’s counsel took Wylie’s City Manager to task for voicing concerns about excess housing density,<sup>12</sup> Lavon’s own residential expert offered uncontradicted evidence that density concerns in an over-saturated market are apparently valid.<sup>13</sup>

It may be more profitable for Hanover if the District is created. The District may give Hanover a competitive advantage over other land developers. It may provide Hanover with another source of revenue, which would certainly be of some benefit to its owners. That is precisely the distinction that the Texas Supreme Court was making when it said mere convenience does not rise to the level of “public necessity.”<sup>14</sup> Neither developer profitability nor the price at which a lot sells is proper considerations for district creation. They do not amount to **public** necessity.

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<sup>11</sup> LeBlanc testimony, RR 217:5-8.

<sup>12</sup> Manson testimony, RR 172:22- 173:1.

<sup>13</sup> Wilson testimony, RR 77:8-20; 79:12-15.

<sup>14</sup> *State Banking Bd.*, 618 S.W.2d at 908.

5. *The City suggests a change to Finding of Fact No. 39: “39. The ALJ required a transcript and ordered Applicant to pay for the hearing transcript. Reporting and transcriptions costs for the hearing in this case totaled \$1,820 and should be assessed against the Applicant.”*

The City asserted its legal rights by seeking that Applicant prove each legal element of its case in compliance with applicable statutes and regulatory rules. The City should not be penalized for exercising such rights.

## **II. THE CITY’S RECOMMENDED MODIFICATION TO CONCLUSIONS OF LAW**

Based on the arguments and evidence produced at the Hearing on the Merits, the City suggests the following revisions to the Conclusions of Law as provided below:

*“5. Based on the above Findings of Fact, Wylie does have the ability to provide wastewater services to the District within Wylie’s ETJ.”*

*“8. Based on the above Findings of Fact, the District is not feasible or practicable, in accordance with section 51.021(a)(1) of the Texas Water Code.”*

In the alternative, the City suggests the following language:

*“8. Based on the above Findings of Fact, the District is not feasible or practicable within the ETJ of the City of Wylie, in accordance with section 51.021(a)(1) of the Texas Water Code.”*

*“9. Based on the above Findings of Fact, the District will not benefit the land to be included in the District and the residents, in accordance with section 51.021(a)(2) of the Texas Water Code.”*

In the alternative, the City suggests the following language:

*“9. Based on the above Findings of Fact, the District will not benefit the land to be included in the District and the residents within the ETJ of the City of Wylie, in accordance with section 51.021(a)(2) of the Texas Water Code.”*

*“10. Based on the above Findings of Fact, there is no public necessity or need for the District, in accordance with section 51.021(a)(3) of the Texas Water Code.”*

In the alternative, the City suggests the following language:

*“10. Based on the above Findings of Fact, there is no public necessity or need for the District within the ETJ of the City of Wylie, in accordance with section 51.021(a)(2) of the Texas Water Code.”*

*“11. Based on the above Findings of Fact, the creation of the District will not further the public welfare, in accordance with section 51.021(a)(2) of the Texas Water Code.”*

In the alternative, the City suggests the following language:

*“11. Based on the above Findings of Fact, the creation of the District will not further the public welfare within the ETJ of the City of Wylie, in accordance with section 51.021(a)(2) of the Texas Water Code.”*

*“12. The Application does not meet all the requirements for Commission approval as set out in the Texas Water Code, the Texas Government Code, the Texas Local Government Code, and the relevant requirements of the Commission’s implementing rules.”*

*“13. Based on the above Findings of Fact and Conclusions of Law, the application to create the District should be denied.”*

In the alternative, the City suggests the following language:

*“13. Based on the above Findings of Fact and Conclusions of Law, the application to create the District should be created in part and denied in part. The Application should be denied for all areas within Wylie’s ETJ.”*

### **III. THE CITY’S RECOMMENDED MODIFICATION TO ORDERING PARAGRAPHS**

Based on the arguments and evidence produced at the Hearing on the Merits, the City believes that Conclusion of Law No. 2 should be deleted in its entirety.

The City suggests the following revisions to the Commission’s Ordering Paragraphs as provided below:

*“1. The Application of Lavon 593 Land Investment Partners, L.P. for Creation of Collin County Water Control and Improvement District No. 3 is denied.”*

In the alternative, the City suggests the following language:

*"1. The Application of Lavon 593 Land Investment Partners, L.P. for Creation of Collin County Water Control and Improvement District No. 3 is granted in part and denied in part. The Application is denied for all areas within Wylie's ETJ."*

*"3. All transcription costs shall be borne by the Applicant."*

#### **IV. CONCLUSION**

The City respectfully requests that the Commission deny the Application consistent with the changes suggested above.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2010, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following counsel or party representatives of record:

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